SUPREME COURT OF THE UNITED STATES.

No. 395.—October Term, 1926.

The United States of America, Plaintiff in Error, *vs.* Solomon Noveck.	In Error to the District Court of the United States for the Southern District of New York.

[January 24, 1927.]

Mr. Justice Brandeis delivered the opinion of the Court.

Noveck was indicted in two counts under § 125 of the Criminal Code, in the federal court for southern New York, for perjury in making returns for the purpose of taxation.[1] To the first count he pleaded the statute of limitations. The District Court sustained the plea; and its judgment was affirmed in *United States* v. *Noveck*, 271 U. S. 201. To the second count he filed both a demurrer and a motion to quash on the ground that it did not state facts sufficient to constitute an offense. The objection was overruled. Thereupon, Noveck pleaded guilty. He was sentenced to a fine of $2,000 and to imprisonment for four months. He paid the fine and was taken into custody.

While Noveck was still in prison, the United States Circuit Court of Appeals for the Second Circuit held in *Steinberg* v. *United States*, an unreported opinion, that § 125 of the Criminal Code had been repealed, so far as concerns perjury on tax returns, by § 253 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 268, which makes it an offense willfully to attempt in any manner to defeat or evade

[1]Section 125: "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years."

a tax.[2] The term of the District Court at which Noveck was sentenced not having ended, he moved immediately to vacate the sentence. The motion was granted; a motion in arrest of judgment was sustained; and the court allowed this writ of error under the Criminal Appeals Act, March 2,1907, c. 2564, 34 Stat. 1246. After the docketing of the case in this Court, the Court of Appeals withdrew its unreported opinion in the *Steinberg* case and, reversing itself, held that the Revenue Act of 1921 did not repeal § 125 of the Criminal Code as applied to perjury on tax returns, 14 F. (2d) 564. The Government, deeming it impossible to reinstate Noveck's sentence by any proceeding in the District Court, continues to prosecute the writ of error. Compare *Keyser* v. *Farr*, 105 U. S. 265.

The jurisdiction of this Court is conceded. The sole question requiring discussion is whether § 253 of the Revenue Act of 1918 (re-enacted as § 253 of the Revenue Act of 1921) repeals, as to false tax returns, § 125 of the Criminal Code. There was confessedly no express repeal; and it is clear that the two sections are not inconsistent. Noveck's contention is that a repeal was effected, because Congress manifested the intention of supplanting the provision of the Criminal Code, in so far as it relates to perjury in income tax returns, by embodying in the Revenue Act all provisions dealing with the various methods of defeating or evading taxes therein imposed. The argument is that § 253 of the Revenue Act includes within its condemnation anyone "who willfully attempts in any manner to defeat or evade the tax imposed by this title;" that perjury to an income tax return is one manner or method of defeating or evading the tax; and that, since all

[2]Section 253 provides: "That any individual, corporation, or partnership required under this title to pay or collect any tax, to make a return or to supply information, who fails to pay or collect such tax, to make such return, or to supply such information at the time or times required under this title, shall be liable to a penalty of not more than $1,000. Any individual, corporation, or partnership, or any officer or employee of any corporation or member or employee of a partnership, who willfully refuses to pay or collect such tax, to make such return, or to supply such information at the time or times required under this title, or who willfully attempts in any manner to defeat or evade the tax imposed by this title, shall be guilty of a misdemeanor and shall be fined not more than $10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution." The wording follows exactly that of § 253 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1085, under which Noveck made the return in question.

methods are made punishable under § 253, Congress must have intended that perjury in making false returns should no longer be punishable under § 125.

The conclusion stated does not follow. The offenses defined in the two statutes are not identical. They are entirely distinct in point of law, even when they arise out of the same transaction or act. Each involves an element not found in the other. Compare *Morgan* v. *Devine*, 237 U. S. 632. The crime of perjury is complete when the oath is taken with the necessary intent, although the false affidavit is never used. *Noah* v. *United States*, 128 Fed. 270; *Berry* v. *United States*, 259 Fed. 203. Compare *United States* v. *Rhodes*, 30 Fed. 431, 433. The making of a false affidavit, without presentation thereof, does not constitute an attempt to evade the tax law. See *United States* v. *Rachmil*, 270 Fed. 869, 871. The crime of attempting to defeat or evade the Revenue Law may be committed without verification of a false tax return. *Emmich* v. *United States*, 298 Fed. 5, 10. Congress, having power to make both the false swearing and the use of the false affidavit punishable, *Albrecht* v. *United States*, No. 9, decided January 3, 1927, did so. Compare *United States* v. *Rabinowich*, 238 U. S. 78; *Kennedy* v. *United States*, 265 U. S. 344. The fact that perjury is a felony, while filing a false return is only a misdemeanor, presented no obstacle. Compare *United States* v. *Lawrence*, 26 Fed. Cas. No. 15,572. There is nothing in the history of the revenue legislation which should lead us to a different conclusion. Our decision is in accord with the view taken by those circuit courts of appeals which have dealt with the question. *Levin* v. *United States*, 5 F. (2d) 598, 600; *Steinberg* v. *United States*, 14 F. (2d) 564.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.